Supreme Court U.S.
FILED
DEC 26 2002
OFFICE OF THE CLERK

No. 02-834

In The

Supreme Court of the United States

JERICOL MINING INC. and OLD REPUBLIC INSURANCE COMPANY,

Petitioners,

v.

EUGENE NAPIER AND DIRECTOR OF OFFICE WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE RESPONDENT EUGENE NAPIER IN OPPOSITION

SIDNEY B. DOUGLASS
Attorney at Law
117 South Second Street
P.O. Drawer 839
Harlan, Kentucky 40831
(606) 573-1985

Counsel of Record for Respondent, Eugene Napier

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the Administrative Law Judge's Findings and assessment of the physicians' credibility are rational and are supported by substantial evidence.

2. Whether the Sixth Circuit's treating physician rule violates sections 7(C) and 12 of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 556(D), 559, Section 21(B) and (C) of the Longshore Act ("LHWCA"), 33 U.S.C. §§ 921(B), (C) and this Court's law prohibiting per se rules exaggerating the weight that must be accorded certain evidence without a valid reason.

3. Whether the Department of Labor's treating physician rule in 20 C.F.R. § 718.104 is valid but moot in regard to Mr. Napier's claim.

LIST OF PARTIES AND RULE 29.6 STATEMENT

The Petitioner's Petition correctly identifies the Parties. Pet. ii. The Respondent, Eugene Napier, is not a subsidiary or affiliate of a publicly owned corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	1
ARGUMENT	3
I. THE ADMINISTRATIVE LAW JUDGE'S FINDINGS AND ASSESSMENT OF THE PHYSICIANS' CREDIBILITY ARE RATIONAL AND ARE SUPPORTED BY SUBSTANTIAL EVIDENCE	3
II. THE SIXTH CIRCUIT'S TREATING PHYSICIAN RULE DOES NOT VIOLATE SECTIONS 7(C) AND 12 OF THE ADMINISTRATIVE PROCEDURE ACT ("APA"), 5 U.S.C. §§ 556(D), 559, SECTION 21(B) AND (C) OF THE LONGSHORE ACT ("LHWCA"), 33 U.S.C. §§ 921(B), (C) AND THIS COURT'S LAW PROHIBITING PER SE RULES EXAGGERATING THE WEIGHT THAT MUST BE ACCORDED CERTAIN EVIDENCE WITHOUT A VALID REASON	5
III. THE DEPARTMENT OF LABOR'S TREATING PHYSICIAN RULE IN 20 C.F.R. § 718.104 IS VALID, BUT THE NEW RULE WAS NOT USED IN THE DISPOSITION OF MR. NAPIER'S CLAIM AND, THEREFORE, THIS ISSUE IS MOOT IN REGARD TO MR. NAPIER'S CLAIM	7
CONCLUSION	9

TABLE OF AUTHORITIES

Page

CASES:

Director v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994) 6

Gray v. Peabody Coal Co., 35 Fed. Appx. 138 (6th Cir. 2002) 5

Griffith v. Director, Office of Workers' Comp., 49 F.3d 184 (6th Cir. 1995) 6

Halsy v. Richardson, 441 F.2d 1230 (6th Cir. 1971) 7

National Mining Association v. Department of Labor, 292 F.3d 849 (D.C. Cir. 2002) 7, 9

O'Keeffe v. Smith, Hinchman & Grylls Assoc., Inc., 85 S.Ct. 1012 (1965) 3

Peabody v. Groves, 277 F.3d 829 (6th Cir. 2002) 5, 6

Tussey v. Island Creek Coal Co., 982 F.2d 1036 (6th Cir. 1993) 5

STATUTES AND REGULATIONS:

20 C.F.R. § 718.104 (d) 9

20 C.F.R. § 718.104 (d)(5) 7

20 C.F.R. § 718.202 (a)(4) 3, 4

20 C.F.R. § 718.204 (c)(1) 4

20 C.F.R. § 718.301-718.306 (1993) 6

BRIEF FOR THE RESPONDENT EUGENE NAPIER IN OPPOSITION

OPINIONS BELOW

The Opinions below are correctly stated in the Petitioner's Petition. Pet. 1.

JURISDICTION

The jurisdiction of the Court is correctly stated in the Petitioner's Petition. Pet. 2.

STATEMENT OF THE CASE

The Respondent, Eugene Napier, is a 53 year old retired coal miner. He worked 20 years in the underground coal mines where he breathed coal dust on a daily basis. Mr. Napier's work in the mines involved strenuous manual labor. Mr. Napier last worked in the coal mines in May of 1992 when he was employed as a repairman by the Petitioner, Jericol Mining, Inc., a Kentucky mine. He has not worked since. Pet. App. 61-62.

After May 1992, Mr. Napier filed a claim for state workers' compensation benefits and on March 9, 1993 filed an application for federal black lung benefits. Mr. Napier suffers from shortness of breath, tightness in his chest and wheezing which limits his physical activities and interferes with his sleeping at night. He has taken a multitude of breathing medications since 1992 and when the proof in this case was taken, he was being prescribed breathing medications: Servent, Proventil and Azmacort by his treating physician, Dr. Kabani. Mr. Napier has a limited

tobacco smoking history. He began smoking in his early 20's and smoked approximately 5-7 years. He then quit for 5-7 years and then smoked 1 cigarette per day with his coffee for approximately 8 years. Pet. App. 61-62.

Following the filing of Mr. Napier's federal black lung claim, the claim was administratively denied. However, following an informal conference, the District Director's Office issued a Proposed Order of Memorandum on June 17, 1995 granting his claim. The employer appealed and the claim was heard by Administrative Law Judge Rudolf Jansen on October 24, 1995. Administrative Law Judge Jansen granted benefits by Decision and Order on May 9, 1996 and upon reconsideration by Order dated September 30, 1996. The employer appealed to the Benefits Review Board who affirmed in part and remanded in part on February 27, 1998. On November 23, 1996, Administrative Law Judge Jansen issued a Decision and Order on Remand-Awarding Benefits which decision was affirmed by Order of the Benefits Review Board on June 28, 2000 and by Order denying reconsideration on December 21, 2000. The employer appealed to the U.S. Court of Appeals for the 6th Circuit who affirmed the decision of the Benefits Review Board in an opinion filed on August 30, 2002. Pet. App. 1. It is from this decision that the Petitioner has filed his Petition for a Writ of Certiorari to the Court.

The medical evidence in this case is naturally contradictory. Although Mr. Napier presented x-ray reports of highly qualified medical readers of x-rays that he had coal workers' pneumoconiosis, the employer obtained more negative x-ray opinions. Pet. App. 65. The claim also included the reports or records of six physicians who actually saw Mr. Napier; four of these physicians, Drs. Baker, Frank, Kabani and Miller, were of the opinion Mr.

Napier had pneumoconiosis. Two physicians, Drs. Broudy and Dahhan, who examined Mr. Napier at the request of the employer were of the opinion Mr. Napier did not have pneumoconiosis. Pet. App. 67-69.

ARGUMENT I

THE ADMINISTRATIVE LAW JUDGE'S FINDINGS AND ASSESSMENT OF THE PHYSICIANS' CREDIBILITY ARE RATIONAL AND ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

This is a substantial evidence case! The Court should deny the Petitioner's Petition for Writ of Certiorari in this case because the findings of the Administrative Law Judge are rational and supported by substantial evidence. *O'Keeffe v. Smith, Hinchman & Grylls Assoc., Inc.*, 85 S.Ct. 1012 (1965). In support of his claim, Mr. Napier presented x-ray reports of highly qualified medical readers of x-rays who diagnosed him with having coal workers' pneumoconiosis. As is often the case, the employer with its financial resources obtained more negative x-ray readings from qualified physicians. Pet. App. 65. Based on the preponderance of evidence, the Administrative Law Judge found on remand Mr. Napier did not establish pneumoconiosis by x-ray pursuant to 20 C.F.R. § 718.202 (a)(4). Pet. App. 33. However, pneumoconiosis may be proved by means other than an x-ray. This claim includes the records of six physicians who actually saw Mr. Napier. Four of these doctors, Dr. Baker, Dr. Kabani, Dr. Miller and Dr. Frank, were of the opinion Mr. Napier had pneumoconiosis. Dr. Kabani was Mr. Napier's treating physician for a year and a half. Drs. Baker, Frank and Miller were evaluating physicians although Dr. Baker had evaluated Mr. Napier

four times from June 1992 until September 1995. The two physicians who examined Mr. Napier at the request of the employer were Drs. Broudy and Dahhan. Although Dr. Dahhan and Dr. Broudy conceded that Mr. Napier had a disabling respiratory condition, they were of the opinion his pulmonary condition was not related to his coal dust exposure; however, the two physicians did not adequately answer what was the cause of Mr. Napier's pulmonary condition in light of his minimal smoking history. Pet. App. 67-69. The Administrative Law Judge made a credibility determination in finding that the opinions of Drs. Baker, Frank, Kabani and Miller were more persuasive than those of Dr. Broudy and Dr. Dahhan. Pet. App. 73-76 and 33-38.

Mr. Napier has had nine ventitory studies which are qualifying under 20 C.F.R. § 718.204 (c)(1) and which establish he has a disabling respiratory condition. Pet. App. 66. There are no nonqualifying pulmonary function studies of record. Pet. App. 56. Mr. Napier's uncontradicted qualifying pulmonary function studies and his 20 years of coal dust exposure support the medical opinions that he has a disabling respiratory condition related to his coal dust exposure and that he has pneumoconiosis within the meaning of 20 C.F.R. § 718.202 (a)(4).

The Administrative Law Judge's findings that Mr. Napier has pneumoconiosis based upon the opinion of a physician exercising sound medical judgment pursuant to 20 C.F.R. § 718.202 (a)(4), that his pneumoconiosis arose out of his coal mine employment and that his pneumoconiosis is totally disabling are findings supported by Mr. Napier's 20 years of underground coal mine dust exposure history, his minimal tobacco smoking history, his severe and disabling respiratory impairment as established by

qualifying pulmonary function studies and his treatment for pneumoconiosis.

ARGUMENT II

THE SIXTH CIRCUIT'S TREATING PHYSICIAN RULE DOES NOT VIOLATE SECTIONS 7(C) AND 12 OF THE ADMINISTRATIVE PROCEDURE ACT ("APA"), 5 U.S.C. §§ 556(D), 559, SECTION 21(B) AND (C) OF THE LONGSHORE ACT ("LHWCA"), 33 U.S.C. §§ 921(B), (C) AND THIS COURT'S LAW PROHIBITING PER SE RULES EXAGGERATING THE WEIGHT THAT MUST BE ACCORDED CERTAIN EVIDENCE WITHOUT A VALID REASON.

The United States Court of Appeals for the Sixth Circuit annunciated what has been called the treating doctor rule in federal black lung cases in the case of *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036 (6th Cir. 1993). In *Tussey*, supra, the Court stated that Administrative Law Judges are allowed to give greater weight to treating physicians than to non-treating physicians in federal black lung claims. *Tussey*, has been followed since in the 6th Circuit including Mr. Napier's case herein and, in *Peabody v. Groves*, 277 F.3d 829 (6th Cir. 2002) and *Gray v. Peabody Coal Co.*, 35 Fed. Appx. 138 (6th Cir. 2002). In *Groves* and *Gray*, the employers' counsel herein has petitioned this Court for Certiorari. The Sixth Circuit treating doctor rule does not establish a per se rule nor does it apply an automatic preference for the opinions and records of the miner's treating physician. The Administrative Law Judge is not required to give greater weight to the treating physician's opinion where he found the opinion equivocal.

Griffith v. Director, Office of Workers' Comp., 49 F.3d 184 (6th Cir. 1995). In *Groves*, supra, p. 834, the Court stated the opinions of treating physicians should not always be presumed to be correct but are entitled to be credited and weighed appropriately. In Mr. Napier's case, the Court did not sustain Administrative Law Judge Jansen's finding giving greater weight to Mr. Napier's treating physician, but sustained the Administrative Law Judge findings as supported by substantial evidence including the reports and opinions of Drs. Baker, Frank and Miller. Pet. App. 11, 15-17 and 19.

The Petitioner's Petition for a Writ of Certiorari in this case regarding the treating doctor rule is generated by the Court's decision in *Director v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251 (1994), in which the Court held the true doubt rule applied by the Department of Labor and Administrative Law Judges improperly shifted the burden of persuasion to the party opposing the claim and was in conflict with the Administrative Procedures Act that placed the burden of proof on the proponent of the relief sought. The Sixth Circuit's treating doctor rule does not shift the burden of proof to the employer; it can help the coal miner meet his burden. But, the rule can also help the coal company; if the treating doctor is of the opinion the miner does not have pneumoconiosis, the employer gets the same benefit of any preferential weight to be given.

Allowing the Administrative Law Judge the discretion to give greater weight to a treating doctor's opinions is no different than allowing the Department's "regulations adopting additional presumptions. See 20 C.F.R. § 718.301-718.306 (1993)" as the Court found permissible in *Greenwich*, supra, p. 280.

The Sixth Circuit's reasonable and rational consideration of treating physicians' opinions giving deferential weight to those opinions when justified is consistent with the Sixth Circuit's long standing view of treating physicians' opinions in social security disability cases, see *Halsy v. Richardson*, 441 F.2d 1230, 1236 (6th Cir. 1971).

ARGUMENT III

THE DEPARTMENT OF LABOR'S TREATING PHYSICIAN RULE IN 20 C.F.R. § 718.104 IS VALID, BUT THE NEW RULE WAS NOT USED IN THE DISPOSITION OF MR. NAPIER'S CLAIM AND, THEREFORE, THIS ISSUE IS MOOT IN REGARD TO MR. NAPIER'S CLAIM.

Within the past year, the Department of Labor significantly revised its regulations regarding the consideration of medical evidence in federal black lung claims including limiting the number of x-ray reports that may be offered by the Parties and including instruction in regard to weight given to treating doctors. The revised regulation went into effect January 19, 2002 and only applies to evidence developed after that date. The revised regulations are not retroactive. *National Mining Association v. Department of Labor,* 292 F.3d 849 (D.C. Cir. 2002). The revised 20 C.F.R. § 718.104 (d)(5) provides:

> (d) Treating physician. In weighing the medical evidence of record relevant to whether the miner suffers, or suffered, from pneumoconiosis, whether the pneumoconiosis arose out of coal mine employment, and whether the miner is, or was, totally disabled by pneumoconiosis or died due to pneumoconiosis, the adjudication officer

must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record. Specifically, the adjudication officer shall take into consideration the following factors in weighing the opinion of the miner's treating physician:

(1) Nature of relationship. The opinion of a physician who has treated the miner for respiratory or pulmonary conditions is entitled to more weight than a physician who has treated the miner for non-respiratory conditions;

(2) Duration of relationship. The length of the treatment relationship demonstrates whether the physician has observed the miner long enough to obtain a superior understanding of his or her condition;

(3) Frequency of treatment. The frequency of physician-patient visits demonstrates whether the physician has observed the miner often enough to obtain a superior understanding of his or her condition; and

(4) Extent of treatment. The types of testing and examinations conducted during the treatment relationship demonstrate whether the physician has obtained superior and relevant information concerning the miner's condition.

(5) In the absence of contrary probative evidence, the adjudication officer shall accept the statement of a physician with regard to the factors listed in paragraphs (d)(1) through (4) of this section. In appropriate cases, the relationship between the miner and his treating physician may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight, provided that

> the weight given to the opinion of a miner's treating physician shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole.

The above regulation was upheld in *National Mining Association*, supra. p. 870. The above regulation is not arbitrary and capricious; it is a reasonable codification of the prior case law regarding consideration of the treating physicians' opinions.

However, Mr. Napier's claim was not decided under the regulations enacted by the Department of Labor on January 19, 2001; the Department of Labor's new treating doctor regulation was not applied in Mr. Napier's case either by the Administrative Law Judge, the Benefits Review Board or the Sixth Circuit Court of Appeals in injudicating this case.

Therefore, the question of the validity of the revised 20 C.F.R. § 718.104(d) in Mr. Napier's case is moot.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

SIDNEY B. DOUGLASS
Attorney at Law
117 South Second Street
P.O. Drawer 839
Harlan, Kentucky 40831
(606) 573-1985

Counsel of Record for
Respondent, Eugene Napier